Supreme Court, U.S.
FILED
OCT 12 1999
OFFICE OF THE CLERK

No. 99-256

IN THE

Supreme Court of the United States

B. WILLIS, CPA, INC.,

Petitioner,

v.

PUBLIC SERVICE COMPANY OF OKLAHOMA and BURLINGTON NORTHERN AND SANTA FE RAILWAY COMPANY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

JON E. BRIGHTMIRE
Counsel of Record
RICHARD P. HIX
DOERNER, SAUNDERS, DANIEL & ANDERSON, L.L.P.
Attorneys for Respondent Public Service Company of Oklahoma
320 South Boston
Suite 500
Tulsa, OK 74103
(918) 582-1211

ROBERT J. CAMPBELL, JR.
Counsel of Record
HUGH D. RICE
MICHAEL R. PERRI
RAINEY, ROSS, RICE & BINNS
Attorneys for Respondent Burlington Northern and Santa Fe Railway Company
735 First National Center West
Oklahoma City, OK 73102
(405) 235-1356

155548

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (300) 359-6859

STATEMENT PURSUANT TO RULE 29.6

Respondent Public Service Company of Oklahoma ("PSO") is a wholly-owned subsidiary of Central and Southwest Corporation and no publicly held company owns 10% or more of its stock. Respondent Burlington Northern and Santa Fe Railway Company ("BNSF Rwy") is a wholly-owned subsidiary of Burlington Northern Santa Fe Corporation and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

Page

Statement Pursuant to Rule 29.6 i

Table of Contents ii

Table of Cited Authorities v

Statement of the Case 1

A. Background Facts 1

B. Course of Proceedings and Disposition Below. 5

C. The Petition for a Writ of Certiorari 9

Reasons for Denying the Writ 10

I. The Court Of Appeals Did *Not* Hold That A Property Owner Is Required To Accept Just Compensation When A Condemnor Seizes Property For A Private Use. Rather, The Court Of Appeals Properly Held That Willis's Claims Based Upon The Assertion That PSO's Condemnation Was For A Private Use Were Not Ripe, But Must Await Determination Of The Public Use Issue In The State Court Proceedings. 10

II. The Court Of Appeals Correctly Held That A Predeprivation Hearing On The Public Use Issue Is Not Constitutionally Required In Eminent Domain Proceedings. 12

Contents

Page

III. Willis's Third Claim-that Property Owners May Maintain Actions In Federal Court Under Section 1983 Against Parties Who Seize Their Property By Subverting The Judicial Process — Misstates The Court Of Appeals' Opinion And Should Not Be Considered By The Court. 18

IV. In Its Fourth Argument, Willis Seeks Certiorari Review Of Its Contention That When Violations Of Multiple Constitutional Protections Are Alleged A Federal Court May Not Base Its Decision On What It Defines As The Predominant Claim. Certiorari Review Of This Issue Should Be Denied Because Willis Has Failed To Identify Any Compelling Reason For Review, And The Court Of Appeals' Opinion Was Correct. 21

V. In Its Fifth Argument, Willis Makes The Sweeping Claim That The Court Of Appeals Held That A Property Owner Is Required To Seek Just Compensation In State Court Before Bringing A § 1983 Action In Federal Court For Violation Of Specific Constitutional Protections. The Court Of Appeals Held No Such Thing. The Court Of Appeals Determined Two Of Willis's Claims On The Merits, And Held The Remainder Of Willis's Claims Asserting Particular

Contents

Page

Objections To The State Proceeding Must Await A Final Decision In Those Proceedings. 23

VI. The Court Of Appeals Determined That Under Oklahoma Eminent Domain Law A Condemnor May Take Possession Of The Condemned Premises Prior To A Hearing On The Right To Take. In Its Sixth Argument, Willis Contends The Court Of Appeals, In So Holding, Failed To Follow Oklahoma Law As Pronounced By The Oklahoma Supreme Court. Certiorari Review Of Willis's Sixth Argument Should Be Denied As Willis Fails To State A Compelling Reason For This Court To Grant Certiorari, And Willis's Claim Has No Merit. 27

Conclusion 30

TABLE OF CITED AUTHORITIES

Page

Cases:

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 10, 11

Bateman v. City of West Bountiful, 89 F.3d 704 (10th Cir. 1996) 12, 22

Bragg v. Weaver, 251 U.S. 57 (1919) 13, 14, 17

City of Bartlesville v. Ambler, 499 P.2d 433 (Okla. 1971) 29

County of Allegheny v. Frank Mashuda Company, 360 U.S. 185 (1959) 25, 26

Dennis v. Sparks, 449 U.S. 24 (1980) 18, 19, 20

Fuentes v. Shevin, 407 U.S. 67 (1972) 17

Government of Virgin Islands v. 19.623 acres of land, 536 F.2d 566 (3d Cir. 1976) 17

Hicks v. Miranda, 422 U.S. 332 (1975) 15

Hodel v. Virginia Surface Mining and Reclamation Association, Inc., 452 U.S. 264 (1981) 24

Joiner v. City of Dallas, 419 U.S. 1042 (1974), *reh'g denied*, 419 U.S. 1132 (1975), *aff'g*, 380 F. Supp. 754 (N.D. Tex. 1974) 14, 15, 16, 17, 18

Cited Authorities

Page

Lujan v. National Wildlife Federation, 497 U.S. 871 (1990) 10

MacDonald, Sommer & Frates v. County of Yolo, 477 U.S. 340 (1986) 11

McCrady v. Western Farmers Electric Cooperative, 323 P.2d 356 (Okla. 1958) 4, 20

Norco Construction, Inc. v. King County, 801 F.2d 1143 (9th Cir. 1986) 26

Ohio ex rel. Eaton v. Price, 360 U.S. 246 (1959) ... 15

Patsy v. Florida Board of Regents, 457 U.S. 496 (1982) 24

Sinaloa Lake Owners Association v. City of Simi Valley, 882 F.2d 1398 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990) 26

Town of Ames v. Wybrant, 220 P.2d 693 (Okla. 1950) 16, 27, 28

United States v. James Daniel Good Real Property, 510 U.S. 43 (1993) 21, 22

Watkins v. Board of Commissioners, 174 P. 523 (Okla. 1918) 29

Cited Authorities

Page

Western Farmers Electric Cooperative v. Willard, 726 P.2d 361 (Okla. Ct. App. 1986) 16

Williamson County Regional County Planning Commission v. Hamilton Bank of Johnson City, 473 U.S. 172 (1985) 10, 22, 24, 25, 26

Wrightsman v. Southwestern Natural Gas Co., 46 P.2d 925 (Okla. 1935) 16, 28, 29

Wybrant v. Board of Commissioners, 174 P. 523 (Okla. 1918) 29

Statutes:

28 U.S.C. § 1253 15

42 U.S.C. § 1983 ..... 5, 6, 9, 10, 18, 19, 20, 23, 24

Okla. Stat. tit. 12, § 993 3

Okla. Stat. tit. 27, § 7 1

Okla. Stat. tit. 66, §§ 51-60 1

Okla. Stat. tit. 66, § 53(C) 3, 6, 13, 16, 18

Cited Authorities

Page

United States Constitution:

Fifth Amendment 24

Fourteenth Amendment 16, 24

Rules:

10th Cir. R. 36.3(A) 9

United States Supreme Court Rule 10 ..... 9, 27

Other Authorities:

Okla. Const. Art. 2, § 23 16

Okla. Const. Art. 2, § 24 ..... 13, 16

Robert L. Stern, Eugene Gressman, Stephen M. Sharpiro & Kenneth S. Geller, *Supreme Court Practice* (7th Edition) 30

STATEMENT OF THE CASE

A. Background Facts

Respondent Public Service Company of Oklahoma ("PSO") is an Oklahoma public utility which provides electricity to its customers. By virtue of Okla. Stat. tit. 27, § 7 and Okla. Stat. tit. 66, §§ 51-60, PSO is authorized to acquire real property by condemnation.

PSO found it necessary to acquire an easement to build a railroad spur for transporting coal to one of its power plants. A portion of the easement needed by PSO crosses a portion of property owned by Petitioner B. Willis, C.P.A., Inc. ("Willis"). Having failed to acquire the necessary easement from Willis by private purchase, in October 1992 PSO commenced an eminent domain proceeding in state court.[1]

As the Court of Appeals noted, the procedure under Oklahoma law to take real property by condemnation may be outlined in five steps:

(1) The state district court, with notice to the landowner, selects a three person commission;

(2) the commissioners inspect the property, and file a report with the clerk of the court setting forth the value of the property to be taken;

(3) the condemnor may then pay the assessed sum into court, and take immediate possession of the property consistent with its proposed use;

(4) the landowner may file with the court written exceptions to the report objecting to the public use or necessity of the taking or the value assessed; and

(5) the state district court's judgment on the public use or necessity issues or the compensation issue may be appealed.

---

1. *Public Service Company of Oklahoma v. B. Willis, C.P.A., Inc.*, Case No. C-92-507, Rogers County, Oklahoma District Court (hereinafter referred to as the "State Court Condemnation Action").

See Pet. App. A at 3a. As the Court of Appeals further noted, Oklahoma case law has also established that the landowner has the option to seek an injunction from the state district court to enjoin the condemnor from taking possession prior to the adjudication of the public use question. *Id.* at 7a.

In the State Court Condemnation Action, commissioners were appointed by the district court. The commissioners filed their report, setting the total compensation for the taking of Willis's property at $49,920. PSO promptly paid this amount to the court clerk, therefore giving it the right under Oklahoma law to take immediate possession of Willis's property consistent with its proposed use.

Willis filed written exceptions to the commissioners' report, contending that the taking was not necessary and was not for a public use, and that the amount of compensation set by the commissioners was inadequate. At no time between the date the commissioners filed their report and the date the state district court ruled on Willis's exceptions did Willis seek an injunction to enjoin PSO from taking possession of Willis's property after PSO paid the commissioners' award into court.

In March 1994 the state district court ruled in favor of PSO on Willis's claim that the taking was not necessary or for a public purpose. In doing so, the state district court held that the filing of the condemnation petition shifted the burden to Willis to present evidence to vitiate the taking, and rejected Willis's argument that PSO was required to introduce into evidence a resolution of necessity. Willis appealed this ruling.[2] Willis's appeal was limited to whether he was given a proper hearing and whether he was entitled to certain discovery. [3]

---

2. Oklahoma Supreme Court Appeal No. 83,358.

3. Willis falsely asserts that in this appeal the Oklahoma Supreme Court ultimately determined that PSO wrongly took possession of Willis's property. PSO's possession of Willis's property had not been accomplished at the time of the state district court's ruling in March 1994, and was not an issue and was not addressed in the court's March

(Cont'd)

During the pendency of the state court appeal, Willis sought interim equitable relief from the Oklahoma Supreme Court prohibiting PSO from constructing the rail spur over Willis's property. The Oklahoma Supreme Court denied Willis's request.

While the state court appeal was pending, in March 1995 PSO completed the railroad spur and began transporting coal over it. When Willis threatened to interfere with the use of the railroad by PSO (and Respondent Burlington Northern and Santa Fe Railway Company ("BN"),[4] PSO's contract rail carrier), in April 1995 PSO obtained an injunction from the state district court prohibiting Willis from interfering, directly or indirectly, with the use of the railroad spur (the "April 1995 Injunction"). In issuing the injunction, the state district court held that PSO had a right to possession and use of Willis's property under Okla. Stat. tit. 66, § 53(C). Although under Oklahoma law Willis had a right to immediately appeal the entry of the injunction, *see* Okla. Stat. tit. 12, § 993, Willis did not exercise this right.

(Cont'd)

1994 judgment. Nor was the possession issue raised by Willis in the appeal. In its published opinion, *see infra* n.5, the Oklahoma Supreme Court did not address whether Okla. Stat. tit. 66, § 53(C) was lawful. The constitutional and statutory violation found by the Oklahoma Supreme Court concerned Willis's failure to have a meaningful opportunity to be heard as a result of the district court's ruling on the discovery and burden of proof issues, the two issues appealed.

In several state court proceedings following the Oklahoma Supreme Court's opinion, including at least three in the Oklahoma Supreme Court itself, Willis has made the same false assertion concerning the scope of the opinion. No court has agreed with Willis's fanciful interpretation of the opinion.

4. On December 31, 1996, The Atchison, Topeka & Santa Fe Railway Company was merged into Burlington Northern and Burlington Northern's name was changed to The Burlington Northern and Santa Fe Railway Company. References herein to "BN" refer to Burlington Northern Railroad Company before December 31, 1996 and to The Burlington Northern and Santa Fe Railway Company on and after December 31, 1996.

In Willis's state court appeal, the Oklahoma Court of Civil Appeals reversed in part and affirmed in part the state district court's ruling. Relying upon *McCrady v. Western Farmers Electric Cooperative*, 323 P.2d 356 (Okla. 1958), the Court of Civil Appeals agreed with the district court and PSO that PSO was not required to file a copy of the resolution of necessity with its petition, and held that the simple act of filing a petition which alleges the taking is necessary and for a public purpose raises a rebuttable presumption that the condemnation is necessary, shifting the burden to the landowner to rebut the presumption. However, the Court of Civil Appeals held Willis was entitled to certain discovery prior to the hearing, and therefore reversed the judgment for a new hearing following such discovery.

Subsequently, on certiorari review, the Oklahoma Supreme Court vacated the Court of Civil Appeals' opinion and reversed the state district court's judgment in its entirety. In a published opinion, the Oklahoma Supreme Court held the Court of Civil Appeals and the state district court erred in their burden of proof analysis, and further erred in denying Willis certain discovery materials.[5] The Oklahoma Supreme Court remanded the case for a new hearing on the public use and necessity issues consistent with its opinion.

Before a new hearing could be held in the state district court, Willis filed a motion to vacate the April 1995 Injunction and to dismiss the condemnation proceeding based, in part, on the contention it makes here that the Oklahoma Supreme Court's opinion determined PSO was wrongly in possession of Willis's property. The state district court denied Willis's motion. Willis appealed the denial of its motion.[6] The Oklahoma Court of Civil Appeals affirmed the district court's judgment. Pet. App. N at 52a. After holding that under Oklahoma law "granting injunctive relief in aid of *a party properly upon the condemned premises, to bar interference with its operations there*, is not totally unrelated to

5. *Public Service Company of Oklahoma v. B. Willis, C.P.A., Inc.*, 941 P.2d 995 (Okla. 1997) (Pet. App. M, at 41a).

6. Oklahoma Supreme Court appeal No. 90,569.

the issues before the court in a condemnation case," *id.* at 60a-61a (emphasis added), the court rejected Willis's interpretation of the Oklahoma Supreme Court's opinion in the first appeal:

> [Willis's] other arguments are colored by his contention that the Supreme Court's opinion on his first appeal constituted "settled law of the case," which necessarily required dismissal of PSO's claim for injunctive relief made in its second petition. We do not agree. . . . *The first appeal resolved only [Willis's] right to an evidentiary hearing, and the question whether PSO established a prima facia case of necessity by alleging necessity in its original petition.* Neither of those issues finally determined the propriety of the trial court's subsequent entry of an order granting injunctive relief, and the question could not even have been timely raised during the pendency of the first appeal, because it was not at issue when the first appeal was commenced.

Id. at 61a-62a (emphasis added). The Oklahoma Supreme Court denied Willis's petition for writ of certiorari to review the Court of Civil Appeals' decision. Mandate has issued, and the case is once again before the state district court for an evidentiary hearing on the right to take issue.

B. Course of Proceedings and Disposition Below.

Prior to the Oklahoma Supreme Court's decision in *PSO v. Willis*, Willis filed these two actions in federal district court. Willis first filed an action against BN for trespassing. Willis then filed a second action against both PSO and BN. In this second action Willis sought to recover against PSO under 42 U.S.C. § 1983. Willis alleged that PSO, by virtue of having taken possession of Willis's property after paying the amount assessed by the commissioners into court, and prior to adjudication of Willis's objection to PSO's right to take its property, violated Willis's constitutional right to equal protection of the law, due process of the law, and access to courts. Willis

further alleged PSO violated Willis's freedom of speech rights when PSO obtained the April 1995 Injunction. In the second action, Willis continued to allege BN was a trespasser.[7]

The two federal actions were consolidated, and dispositive motions were filed by all parties. In its brief in support of its motion to dismiss (which was converted to a motion for summary judgment), PSO set forth a statement of undisputed facts which supported each of its grounds for dismissal. Included among the statements of fact set forth by PSO was the following:

> 17. PSO has done nothing to prevent Willis from asserting his legal and factual positions in the State Court Condemnation Action.

Aplee. Supp. App. at 10.

Willis admitted all the facts set forth by the record of PSO, including statement 17 quoted above. *Id.* at 95. Further, in its statements of fact Willis admitted that "PSO took possession of the Willis property under 66 O.S. § 53(C) on the grounds that it had paid the amount of the commissioners' report to the court clerk." *Id.* at 96.

As the Court of Appeals noted, the District Court identified the crucial issue in the case to be whether Willis had a constitutional right to a final judicial determination of PSO's right to take Willis's property prior to PSO taking possession. The District Court held that no federal right was violated under the undisputed facts of the case, and therefore granted judgment to PSO and BN dismissing Willis's claims.

---

7. The Petition misrepresents that Willis has properly sought relief against BN under 42 U.S.C. § 1983. *See, e.g.*, Pet. at 5. The § 1983 claim filed by Willis in the second action did not include BN. Rather, Willis sued BN in the second action solely for trespass. While Willis sought leave to file an amended complaint in the second action to assert violations of its civil rights by BN, leave was never granted by the District Court, and Willis did not appeal the District Court's failure to grant such leave.

Willis appealed the District Court's judgment to the Court of Appeals. In its Brief in Chief, Willis stated the "Issues Presented for Review" to be the following:

> I. Did the District Court err when it held that the failure to grant Willis a predeprivation hearing on the judicial issue of the public use of PSO's taking of Willis's property did not violate Willis's federally-protected right to equal protection of the law?
>
> II. Did the District Court err when it held that the failure to grant Willis a predeprivation hearing on the judicial issue of the public use of PSO's taking of Willis's property did not violate Willis's federally protected right to due process of law?
>
> III. Did the District Court err when it held that the failure to grant Willis a predeprivation hearing on the judicial issue of the public use of PSO's taking of Willis's property did not violate Willis's federally protected right of access to the courts?
>
> IV. Did the District Court err when it held that the injunction PSO subjected Willis to on April 3, 1995 did not violate Willis's right to freedom of speech?
>
> V. Did the Oklahoma Supreme Court decision establish the trespass claim against BN independent of any § 1983 claim?

Brief in Chief of Appellant at 3. Further, in its "Statement of Case" Willis stated:

> [t]he basis of this action is the acts of Appellees in taking possession of Appellant Willis's property under color of state law prior to a hearing and judicial determination of the public use of such taking in violation of Willis's constitutional and statutory

> rights as established by the decision of the Oklahoma Supreme Court.

Id. Thus, despite Willis's attempt to now expand the factual and legal bases for its claims in its Petition, Willis's appeal to the Court of Appeals involved only: (1) Willis's claim that its failure to receive a predeprivation hearing on PSO's right to take violated its federal constitutional rights to equal protection of the law, due process of law, and access to courts; (2) Willis's claim that the April 1995 Injunction entered in the State Court Condemnation Action violated Willis's freedom of speech rights; and (3) Willis's claim that BN was a trespasser.

The Court of Appeals, in an unpublished opinion, affirmed the District Court's dismissal. With respect to Willis's facial challenge of the constitutionality of the Oklahoma eminent domain procedure because such procedure permits a condemnor to take immediate possession upon payment of the amount assessed by the commissioners before final adjudication of a landowner's objection to the right to take, the Court of Appeals held that a predeprivation hearing is not constitutionally required in the eminent domain context. With respect to Willis's specific objections to its own eminent domain proceeding, the Court of Appeals held that Willis's constitutional claims were not ripe because there had not been a final adjudication of PSO's right to take in the state eminent domain proceeding. With respect to Willis's freedom of speech claim related to the April 1995 Injunction, the Court of Appeals held there was nothing facially speech sensitive about the injunction, and Willis failed to cite any authority to support such a claim. Finally, with respect to Willis's trespass claim against BN, the Court of Appeals noted that Willis itself recognized the claim depended in the first instance upon the legitimacy of the ongoing eminent domain proceedings. The Court of Appeals made it clear that its dismissal of Willis's numerous unripe claims based on lack of subject matter jurisdiction was without prejudice.

C. The Petition for a Writ of Certiorari

Willis requests this Court grant certiorari to review the opinion of the Court of Appeals, asserting six grounds. Willis contends: (1) the Court of Appeals determined a property owner is required to accept just compensation when property is condemned for a private use; (2) there is a procedural due process right to a predeprivation hearing on the public use issue prior to the condemnor taking possession of the condemned property; (3) property owners may maintain an action under 42 U.S.C. § 1983 for subversion of the judicial process; (4) the Court of Appeals erred in holding Willis's due process, equal protection, and access-to-court claims were not ripe; (5) Willis was not required to seek just compensation in state court prior to bringing an action under 42 U.S.C. § 1983; and (6) federal courts are required to follow state law.

Many of the issues of which Willis seeks certiorari review were neither presented as issues to the Court of Appeals nor represent the holding of the Court of Appeals. In any event, each of the issues raised by Willis suffer from the same infirmity: each fails to assert any basis under this Court's Rule 10 for the Court to exercise its sound judicial discretion to review the Court of Appeals' opinion. And, as demonstrated below, the Court of Appeals' opinion, which is unpublished and therefore not binding precedent, *see* 10th Cir. R. 36.3(A), neither "rejects the controlling decisions of the United States Supreme Court on a wholesale basis" nor "blatantly misstates Oklahoma eminent domain law as pronounced by the Oklahoma Supreme Court," as asserted by Willis.[8]

---

8. At most, Willis complains of a misapplication of a properly stated rule of law which, as Rule 10 recognizes, rarely results in the granting of a petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

I.

THE COURT OF APPEALS DID *NOT* HOLD THAT A PROPERTY OWNER IS REQUIRED TO ACCEPT JUST COMPENSATION WHEN A CONDEMNOR SEIZES PROPERTY FOR A PRIVATE USE. RATHER, THE COURT OF APPEALS PROPERLY HELD THAT WILLIS'S CLAIMS BASED UPON THE ASSERTION THAT PSO'S CONDEMNATION WAS FOR A PRIVATE USE WERE NOT RIPE, BUT MUST AWAIT DETERMINATION OF THE PUBLIC USE ISSUE IN THE STATE COURT PROCEEDINGS.

As its first basis for seeking certiorari from this Court, Willis contends the Court of Appeals held Willis was restricted to maintaining a state action for just compensation. The Court of Appeals held no such thing. Rather, the Court of Appeals, relying in part upon *Williamson County Regional County Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), found virtually all of Willis's claims were not ripe because the state court proceedings had not been concluded. Among the issues in the state court proceedings which have not been litigated is the public use issue. Thus, the Court of Appeals' decision that Willis's claims are not ripe was correct, and Willis's first ground for seeking certiorari has no merit.

In *Williamson* this Court held that a state administrative action of which a plaintiff complains must be final before it is reviewable by a federal court under 42 U.S.C. § 1983. The finality requirement enables the issues and factual components of the dispute to be sufficiently fleshed out to permit meaningful judicial review. *See Lujan v. National Wildlife Federation*, 497 U.S. 871, 891 (1990) (a controversy is not ripe for judicial review "until the scope of the controversy has been reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation"); *Abbott Laboratories v. Gardner*, 387 U.S. 136, 148

(1967) (the "basic rationale" of the ripeness requirement is "to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements" and to eliminate "judicial interference until an administrative decision has been formalized and its effects felt in a concrete way"). As this Court noted in *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986), "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *Id.* at 348.

The very nature of Willis's complaint in this case, given the posture of the state court proceedings, compels the conclusion that its claims are not ripe. In its Petition Willis repeatedly states PSO's use of the railroad spur is "non-public" as though there has been such a finding in the state court. *See, e.g.*, Pet. at 10. There has never been such a finding. In fact, the only finding in the state court action was that PSO's taking was public. The trial court so found in March 1994. That finding was subsequently reversed by the Oklahoma Supreme Court, which held the trial court utilized an improper burden of proof at the hearing. The Oklahoma Supreme Court remanded the case back to the trial court for a new hearing on the public use issue under the proper burden of proof.[9] As of this writing the case is awaiting such a hearing. Thus, as between these parties, there has been no final adjudication that PSO's use is non-public.[10]

---

9. The case in which the Oklahoma Supreme Court reversed the trial court and remanded the case to the trial court is appended to the Petition at M. Willis misrepresents the extent of the Oklahoma Supreme Court's decision on page 9 of the Petition, as well as elsewhere in the Petition. Willis continues to assert that the Oklahoma Supreme Court found PSO's possession to be unlawful despite the fact that issue was not before the court, that issue was not addressed by the court, and in subsequent proceedings the state courts have rejected Willis's construction of the Oklahoma Supreme Court's opinion in such a way. *See, e.g.*, App. N to Petition at 61a-62a.

10. In a companion eminent domain case involving other landowners along the same railroad line being condemned by PSO in

(Cont'd)

Once again, the Court of Appeals did not hold Willis is required to accept just compensation if PSO's condemnation is for a private use. The Court of Appeals simply held that for those claims asserted by Willis which derive from the eminent domain proceedings, including its ancillary constitutional claims, such claims are not ripe until there is a final determination in the eminent domain proceeding whether PSO's condemnation is for a public use. The ripeness rule encompasses ancillary constitutional claims because, as the Tenth Circuit previously held, "[a] contrary holding would render the Supreme Court's decision in *Williamson* nugatory, as it would enable a resourceful litigant to circumvent the ripeness requirements simply by alleging a more generalized due process or equal protection violation." *Bateman v. City of West Bountiful*, 89 F.3d 704, 709 (10th Cir. 1996).

The first issue raised by Willis, therefore, presents no compelling basis for this Court to exercise its discretion to grant certiorari review.

II.

THE COURT OF APPEALS CORRECTLY HELD THAT A PREDEPRIVATION HEARING ON THE PUBLIC USE ISSUE IS NOT CONSTITUTIONALLY REQUIRED IN EMINENT DOMAIN PROCEEDINGS.

The second issue Willis presents in its Petition is whether there is a procedural due process right to a hearing on public use prior to the condemnor taking possession of the condemned property. Willis cites no decisions of this Court to support its argument that a predeprivation hearing is required.

Under Oklahoma constitutional and statutory law, once a condemnor pays into court the amount assessed by the commissioners, the condemnor is entitled to possession of the

(Cont'd)
this case, there was a final order entered establishing PSO's use of the railroad spur is necessary and for a public purpose. *See* Instruments in *Public Service Company of Oklahoma v. W.L. Morris, et al.*, Case No. C-92-503, Rogers County, Oklahoma District Court, Exhibit D to Appendix filed by PSO in response to injunction sought by Willis in the Court of Appeals in this case.

condemned property. Okla. Const. Art. 2, § 24;[11] Okla. Stat. tit. 66, § 53(C).[12] Willis admits PSO paid the amount the commissioners awarded into court prior to taking possession of Willis's property. However, Willis maintains PSO's possession prior to a hearing on the public use issue deprived Willis of its procedural due process rights.

Willis's position was rejected by this Court long ago. In *Bragg v. Weaver*, 251 U.S. 57 (1919), a landowner sought an injunction against the taking of earth from his land to be used in repairing an adjacent public road. This Court phrased the landowner's objection thusly:

---

11. This section provides in pertinent part:

> Private property shall not be taken or damaged for public use without just compensation . . . Such compensation shall be ascertained by a board of commissioners. . . . *Until the compensation shall be paid to the owner, or into court for the owner, the property shall not be disturbed, or the proprietary rights of the owner divested. . . .*

(Emphasis added.)

12. This section provides, in pertinent part:

> The commissioners shall be sworn to perform their duties impartially and justly; and they shall inspect said real property and consider the injury which said owner may sustain by reason of the condemnation and they shall assess the just compensation to which said owner is entitled; and they shall forthwith make report in writing to the clerk of the court, setting forth the quantity, boundaries, and just compensation for the property taken, and amount of injury done to the property, either directly or indirectly, which they assess to the owner; which report must be filed and recorded by the clerk. . . . *And if said corporation shall, at any time before it enters upon said real property for the purpose of constructing said road, pay to said clerk for the use of said owner the sum so assessed and reported to him as aforesaid, it shall thereby be authorized to construct and maintain its road over and across said premises.*

(Emphasis added.)

> The objection urged against the statute is that it makes no provision for affording the owner an opportunity to be heard respecting the necessity or expediency of the taking or the compensation to be paid.

Id. at 58. The Court rejected the landowner's contention, stating:

> Where the intended use is public, the necessity and expediency of the taking may be determined by such agency and in such mode as the state may designate. They are legislative questions, no matter who may be charged with their decision, *and a hearing thereon is not essential to due process in the sense of the 14th Amendment.*

Id. (emphasis added). Further, with respect to the landowner's appellate rights, this Court stated:

> The claim is made that this opportunity comes after the taking, and therefore is too late. But it is settled by the decisions of this court that where adequate provision is made for the certain payment of the compensation without unreasonable delay, the taking does not contravene due process of law in the sense of the 14th Amendment merely because it precedes the ascertainment of what compensation is just. . . . As before indicated, it is not questioned that such adequate provision for payment is made in this instance.

Id. at 62 (citations omitted).

This Court subsequently reaffirmed the *Bragg* principle that the Fourteenth Amendment does not require the hearing to which Willis claims it is entitled. In *Joiner v. City of Dallas*, 419 U.S. 1042 (1974), *reh'g denied*, 419 U.S. 1132 (1975), *aff'g*, 380 F. Supp. 754 (N.D. Tex. 1974) (per curiam) (3-judge court), this Court affirmed the district court's decision that the landowner has no due process right to a hearing on the question of the right to take prior to the condemning authority entering

upon and taking possession of the property.[13] Like Willis does here, one of the constitutional challenges raised by the landowners in *Joiner* was "that potential condemnors may acquire the right to possession through Article 3268 prior to an adjudication of the right of condemnation, the necessity for condemnation, or the amount of compensation to be paid." *Joiner*, 380 F. Supp at 771. The *Joiner* Court then explained the relevant aspects of Texas condemnation law, and the protection afforded landowners under Texas law, thusly:

> Initially, we note that both the Texas constitution and the Fourteenth Amendment require that condemnation be for a public purpose and that just compensation be paid to the property owner. Any owner who believes that the condemnor is without authority to initiate condemnation proceedings or that there is no public purpose for the condemnation has two avenues of judicial review. First, by including these issues in the written objections filed in response to the Report of the Special Commissioners in Condemnation, the property owner may litigate these matters in the County Court at Law with the right of appellate review of any final judgment. *Pursuit of this avenue of review does pose the risk that the condemnor will gain the right of possession through Article 3268.*

13. Even though the *Joiner* decision was a summary affirmance without an accompanying opinion, the affirmance was on the merits and has precedential effect. The plaintiffs in *Joiner*, having been denied an injunction by a properly constituted three judge court, had a right of appeal to this Court. 28 U.S.C. § 1253. Once the case was within the appellate jurisdiction of this Court, this Court was required to adjudicate the matter. *Hicks v. Miranda*, 422 U.S. 332 (1975). The Court "[was] not oblig[ed] to grant the case plenary consideration, and [it] did not; but [the Court was] required to deal with its merits." *Id.* at 344. As this Court stated several years earlier, "[v]otes to affirm summarily, . . . it hardly needs comment, are votes on the merits of a case . . . ." *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959) (separate opinion of Brennan, J.).

> As an alternative however, property owners may commence a simultaneous *collateral injunctive action* in district court. If the proposed appropriation is not for a public purpose or the condemnor does not have the power to condemn property, the condemnation proceedings are void, the County Court at Law is without jurisdiction, and the district court will enjoin the condemnation proceedings. . . . *We believe that the ability of the property owners to receive a judicial adjudication of the right to condemn private property through a collateral proceeding sufficiently protects their interest in the property sought to be condemned.*

Id. at 771-2 (emphasis added).

Oklahoma law is very similar to the Texas law reviewed by the *Joiner* Court. The Oklahoma Constitution requires that condemnation be for a public purpose and that just compensation be paid to the landowner. *See* Okla. Const. Art. 2, §§ 23, 24. And under Oklahoma law a landowner may challenge the public purpose for the condemnation in a fashion similar to that permitted by Texas law: by including these issues in written objections filed in response to the report of the commissioners, *see* Okla. Stat. tit. 66, § 53(C) and *Western Farmers Electric Cooperative v. Willard*, 726 P.2d 361, 363 (Okla. Ct. App. 1986), and by seeking injunctive relief. *See Wrightsman v. Southwestern Natural Gas Co.*, 46 P.2d 925, 933 (Okla. 1935) (trial judge could "in a proper case and upon proper application and showing in connection with preliminary steps in a condemnation proceeding, make an order temporarily restraining a condemnor from taking possession of the land pending final determination of the right to condemn by the court proper"); *Town of Ames v. Wybrant*, 220 P.2d 693, 696 (Okla. 1950) (same).

This Court's summary affirmance of the district court's judgment in *Joiner*, an affirmance which was on the merits and upheld the district court's conclusion that a condemnor may, consistent with the Fourteenth Amendment, acquire possession

of property prior to a hearing on the right to condemn or the necessity for condemnation, governs this case and establishes that Oklahoma's statutory scheme permitting a condemnor to take possession upon the condemnor's payment of the commissioners' award into court is likewise constitutional. *See also Government of Virgin Islands v. 19.623 acres of land*, 536 F.2d 566, 570 (3d Cir. 1976) ("[i]t has long been the rule that the due process clause does not require that a landowner whose property is to be condemned be given a hearing in advance to determine whether the taking is necessary") (*citing Bragg*, 251 U.S. at 58-59).

It is equally clear that the United States Supreme Court cases relied upon by Willis involving personal property — such as *Fuentes v. Shevin*, 407 U.S. 67 (1972) — have no application to the determination of the constitutionality of Oklahoma's eminent domain procedures. In *Joiner* the landowners contended that under Texas statutes the power granted to the condemning authority to enter upon and take possession of property prior to an adjudication of the right of condemnation violates the "modern" standards of due process developed through, *inter alia*, *Fuentes*. *Joiner*, 380 F. Supp. at 772. The *Joiner* Court specifically rejected the landowners' contention.

> Although it is unnecessary to our decision, we feel compelled to note that in our opinion plaintiffs have failed to establish that the amount of process constitutionally due in eminent domain procedures has changed since *Bragg*, *Sweet*, and their related cases. We do not believe that the due process standards evolving from *Sniadach*, *Lynch*, *Fuentes* and *Mitchell* are applicable to the condemnation of property under the doctrine of eminent domain. . . .
>
> * * *
>
> *For these reasons, we believe the power of eminent domain to be unique and distinct from any alleged right of possession arising from debtor —*

> *creditor relationships and decline to apply the due process standard created by Sniadach and its progeny to this sovereign power.*

Id. at 773-74 (emphasis added). Again, this Court's summary affirmance of *Joiner* constitutes an affirmance of that part of the *Joiner* decision rejecting the application of *Fuentes* and other debtor/creditor cases to eminent domain proceedings.

Because Willis admits PSO has followed the provisions of Okla. Stat. tit. 66, § 53(C) in taking possession of Willis's property and constructing the railroad track across it, it follows that PSO's possession, use, and defense of the railroad track, including defending the track from interference by Willis, does not "implicate" any of Willis's rights under the United States Constitution. Accordingly, the Court of Appeals correctly held that a predeprivation hearing is not constitutionally required in eminent domain proceedings.

III.

WILLIS'S THIRD CLAIM — THAT PROPERTY OWNERS MAY MAINTAIN ACTIONS IN FEDERAL COURT UNDER SECTION 1983 AGAINST PARTIES WHO SEIZE THEIR PROPERTY BY SUBVERTING THE JUDICIAL PROCESS — MISSTATES THE COURT OF APPEALS' OPINION AND SHOULD NOT BE CONSIDERED BY THE COURT.

For its third ground for certiorari review, Willis states "[p]roperty owners may maintain actions in federal court under 42 U.S.C. § 1983 against parties who seize their property by subverting the judicial process." Pet. at 14. Willis contends the Court of Appeals' opinion conflicts with *Dennis v. Sparks*, 449 U.S. 24 (1980).

First, the Court of Appeals did not hold that property owners may not maintain a § 1983 claim based upon subversion of the judicial process.

Second, Willis failed to provide any evidence of its scurrilous factual allegations. Willis admitted each factual statement set forth in the brief in support of PSO's motion to dismiss (which was converted to a motion for summary judgment). Included among the factual statements made by PSO which Willis admitted was the following:

> 17. PSO has done nothing to prevent Willis from asserting his legal and factual positions in the State Court Condemnation Action.

Aplee. Supp. App. at 10, 95. Given Willis's admission that PSO did not prevent Willis from asserting its rights in the state court action, and the complete absence of any evidence of such interference by PSO, the Court of Appeals had no basis to hold Willis stated a § 1983 action against PSO for subversion of the judicial process.

Third, Willis failed to allege any compelling reason for this Court to exercise its discretion to grant certiorari review. While certiorari may be granted when a Court of Appeals has decided an important question of federal law in a way that conflicts with a decision of this Court, the Court of Appeals' opinion in this case does not conflict with *Dennis v. Sparks*. Nowhere in its opinion did the Court of Appeals hold that Willis may not assert a § 1983 action. Rather, the Court of Appeals simply held that any constitutional claim Willis may have is not ripe until the state court eminent domain proceeding is concluded.

In its Petition, Willis continues to allege scurrilous factual allegations which have absolutely no support in the record. For instance, Willis alleges PSO "intentionally" and "corruptly" persuaded the state district court judge to rule against Willis. This allegation stems from the state district court's decision in March 1994 overruling Willis's objection to the condemnation based upon the lack of necessity or

public purpose, the decision which was ultimately reversed by the Oklahoma Supreme Court.[14]

There is no question that PSO argued that under Oklahoma law the allegation of necessity and public purpose in its condemnation petition was sufficient to shift the burden to present evidence to vitiate the taking to Willis. In doing so, PSO relied upon *McCrady v. Western Farmers Electric Cooperative*, 323 P.2d 356 (Okla. 1958). Both the state trial court and the Oklahoma Court of Civil Appeals agreed with PSO's position, also relying upon *McCrady*. The Oklahoma Supreme Court, however, disagreed, and in clarifying Oklahoma law held the initial burden is on the condemnor, that burden is not met by the simple allegation of necessity in the petition, and introduction of a resolution of necessity adopted by the appropriate body into evidence would meet the condemnor's burden. The Oklahoma Supreme Court remanded the case to the trial court for a new hearing on the taking issue consistent with its opinion.

There was no holding by the Court of Appeals that a landowner may not bring a § 1983 action for subversion of the judicial process. There is no factual support for the issue in any event. There is no evidentiary record here like there was in *Dennis v. Sparks*. Accordingly, certiorari review of the third issue presented by Willis should be denied.

---

14. Willis's attempt to assert the corrupt subversion of the state court judge in 1994 is belied by the fact that Willis made no attempt to seek the disqualification of the judge from the ongoing eminent domain proceeding until more than three years later. Neither the presiding judge of the judicial district nor the Oklahoma Supreme Court, after holding hearings, required disqualification of the state court judge, despite Willis's application to both to have the district judge disqualified.

IV.

IN ITS FOURTH ARGUMENT, WILLIS SEEKS CERTIORARI REVIEW OF ITS CONTENTION THAT WHEN VIOLATIONS OF MULTIPLE CONSTITUTIONAL PROTECTIONS ARE ALLEGED A FEDERAL COURT MAY NOT BASE ITS DECISION ON WHAT IT DEFINES AS THE PREDOMINANT CLAIM. CERTIORARI REVIEW OF THIS ISSUE SHOULD BE DENIED BECAUSE WILLIS HAS FAILED TO IDENTIFY ANY COMPELLING REASON FOR REVIEW, AND THE COURT OF APPEALS' OPINION WAS CORRECT.

In its fourth argument, Willis asserts the Court of Appeals erred in holding Willis's due process, equal protection, and access-to-courts claims were also encompassed by the ripeness rule applied by the Court of Appeals, and were therefore premature. As sole support for this claim, Willis relies upon *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993).

All of Willis's constitutional claims arise out of the state court eminent domain proceeding. As detailed earlier in this brief, *supra* at 7, Willis tendered five issues for review to the Court of Appeals. Three of the five issues concerned whether PSO's possession of Willis's property prior to a hearing on the right to take violated specific constitutional rights of Willis. The operative facts for each of these claims are the same, and the underlying principle to be applied is the same. So while Willis may have asserted different theories of recovery, his cause of action is one and the same.

That the first three issues asserted by Willis alleged but a single cause of action is borne out by Willis's Statement of Case in its appeals court brief, in which Willis stated that "[t]he basis of this action is the acts of Appellees in taking possession of Appellant Willis's property under color of state law prior to a hearing and judicial determination of the public use of such taking in violation of Willis's constitutional and statutory rights

as established by the decision of the Oklahoma Supreme Court." Brief in Chief of Appellant at 2-3.[15]

The Court of Appeals addressed and resolved separately Willis's facial challenge to Oklahoma's eminent domain procedures. Having determined Oklahoma's eminent domain procedures are constitutional, the remainder of Willis's claims relating to the actual adjudication of the taking issue itself by the Oklahoma courts clearly are not ripe until there is a final decision by the Oklahoma courts on the right to take issue.

The Court of Appeals' decision in this case does not run counter to *James Daniel*. First, *James Daniel* was not an eminent domain case, and did not involve collateral state court proceedings the outcome of which would have a direct impact on the plaintiff's federal claims. Second, *James Daniel* contained no discussion of the ripeness rule applied by the Court of Appeals in this case. Third, the Court of Appeals did not hold that Willis cannot assert multiple constitutional wrongs, or may only assert its dominant constitutional claim. Rather, for purposes of applying the ripeness rule, the Court of Appeals found that all of the constitutional infirmities of which Willis complains relate to the state eminent domain proceedings, and therefore pursuit of such claims should await the ripening of the predominant claim.

Thus, the Court of Appeals' decision is not in conflict with this Court's holding in *James Daniel*. Willis has completely failed to identify any compelling basis for this Court to grant certiorari with respect to Willis's Fourth Argument.

---

15. As previously observed, because Willis's objections under the most pertinent provision of the federal constitution is not ripe, its ancillary constitutional claims are likewise unripe. *Supra* at 12. Any contrary holding would permit one to circumvent *Williamson's* ripeness requirement with generalized due process and equal protection complaints, a result the Tenth Circuit has repeatedly rejected. *Bateman* at 709.

V.

IN ITS FIFTH ARGUMENT, WILLIS MAKES THE SWEEPING CLAIM THAT THE COURT OF APPEALS HELD THAT A PROPERTY OWNER IS REQUIRED TO SEEK JUST COMPENSATION IN STATE COURT BEFORE BRINGING A § 1983 ACTION IN FEDERAL COURT FOR VIOLATION OF SPECIFIC CONSTITUTIONAL PROTECTIONS. THE COURT OF APPEALS HELD NO SUCH THING. THE COURT OF APPEALS DETERMINED TWO OF WILLIS'S CLAIMS ON THE MERITS, AND HELD THE REMAINDER OF WILLIS'S CLAIMS ASSERTING PARTICULAR OBJECTIONS TO THE STATE PROCEEDING MUST AWAIT A FINAL DECISION IN THOSE PROCEEDINGS.

In its Fifth Argument, Willis asserts a property owner is not required to seek just compensation in state court before bringing a § 1983 action in federal court for violation of specific constitutional protections. This sweeping assertion by Willis makes no attempt to distinguish between the various issues Willis raised on appeal and the different dispositions of those issues by the Court of Appeals, thus misstating the Court of Appeals' holding.

The Court of Appeals determined on the merits Willis's generalized facial challenge to Oklahoma's eminent domain procedure, as well as Willis's freedom of speech claim. The Court of Appeals did not hold that these two claims must await the seeking of just compensation.

However, as the Court of Appeals recognized, Oklahoma law "affords [Willis] the right to challenge both the justification of PSO's taking and the adequacy of any resulting compensation." Pet. App. at 5a. Because both the taking issue and the just compensation issue have been raised by Willis in the state court proceedings, and those proceedings have not been concluded, the Court of Appeals properly determined that any objection Willis may have to the state proceedings under federal

law are not ripe for adjudication and should be dismissed without prejudice under *Williamson*.

In *Williamson* the owner of a tract of land sued a county regional planning commission, alleging the commission's application of various zoning laws and regulations to the landowners' property amounted to a taking of the property. The commission contended that a government regulation that may be so restrictive that it denies a property owner all reasonable beneficial use of its property should not be viewed as a taking under the Fifth Amendment, but rather as a violation of the Fourteenth Amendment's due process clause. This Court found, however, that whether application of the commission's regulations to the landowner's property constituted a taking under the Fifth Amendment *or* constituted a violation of the landowner's due process rights under the Fourteenth Amendment, the landowner's claim was premature because the landowner had not yet obtained a final decision regarding the application of regulations to its property, nor utilized state procedures for obtaining just compensation. In so holding, this Court stated that a claim that application of government regulations effects a taking or property is not ripe until the government entity charged with implementing the regulations has reached a final decision. *Williamson* at 186. *See also Hodel v. Virginia Surface Mining and Reclamation Association, Inc.*, 452 U.S. 264 (1981).

The landowner in *Williamson* made the same argument offered by Willis here — that it should not be required to pursue the state action to a final decision because its federal lawsuit was predicated upon 42 U.S.C. § 1983, and there is no requirement that a plaintiff exhaust administrative remedies before bringing a § 1983 action. Willis, like the landowner in *Williamson*, relies in part upon *Patsy v. Florida Board of Regents*, 457 U.S. 496 (1982). As this Court explained in *Williamson*, "[t]he question whether administrative remedies must be exhausted is conceptually distinct, however, from the question whether an administrative action must be final before it is

judicially reviewable." *Williamson* at 192. The Court explained that the "finality" requirement is concerned with whether the initial decision maker has arrived at a definitive position on the issue that inflicts an actual, concrete injury; the exhaustion requirement generally refers to administrative and judicial procedures by which an injured party may seek review of an adverse decision and obtain a remedy if the decision is found to be unlawful or otherwise inappropriate. *Id.* Because the initial decisionmaker has not arrived at a definitive position on the issue raised by Willis — whether PSO's taking is for a public purpose — the finality requirement clearly applies in this case.

In short, *Williamson* did not limit its ripeness holding to the landowner's claim for just compensation. Rather, it applied the ripeness rule to both the taking issue and the due process claim. And when, as here, the state procedure provides for the determination of both the taking issue and the just compensation issue in one lawsuit, the landowner must await the outcome of that lawsuit.

None of the lengthy list of cases cited by Willis supports granting certiorari under Willis's fifth argument. Indeed, only two of the cases cited by Willis are condemnation actions. The first, *County of Allegheny v. Frank Mashuda Company*, 360 U.S. 185 (1959), is clearly distinguishable. In *County of Allegheny* a county invoked applicable eminent domain statutes of the State of Pennsylvania to appropriate private property to improve and enlarge a public airport. A court-appointed board assessed damages for the taking. Both the county and the landowners appealed the amount of damages assessed. Subsequent to the time the county obtained possession of the property the landowner learned the property had been leased to a corporation for alleged private business use. The landowner, invoking diversity jurisdiction, sued the county in federal district court claiming that under Pennsylvania law private property cannot be taken by eminent domain for a private use. This Court held that under the particular facts presented, the federal district court should have considered the landowner's claim. The important

factual distinctions in *County of Allegheny* were: (1) under Pennsylvania law an objection to the necessity of the taking is brought in a proceeding *independent* of that in which compensation is awarded, unlike in Oklahoma where the determination of whether the taking is for a public use is made in the same proceeding as the award of compensation, and thus the separate suit brought by the Pennsylvania landowner in federal court had the same effect as if a separate suit had been brought in state court; and (2) the landowner's suit was based simply upon state law, and did not involve federal constitutional questions such as those present here.[16]

The second condemnation case cited by Willis is *Sinaloa Lake Owners Association v. City of Simi Valley*, 882 F.2d 1398 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990). *Sinaloa* is not in conflict with the Court of Appeals' decision here. *Sinaloa* involved a complaint that government entities deprived property owners of their rights under the Fourth, Fifth, and Fourteenth Amendments as a result of the government's actions in breaching a dam and destroying a lake. The Ninth Circuit cited its prior decision in *Norco Construction, Inc. v. King County*, 801 F.2d 1143 (9th Cir. 1986), in which it held that a plaintiff's failure to obtain from a state proceeding a final determination on the status of the property rendered his equal protection and due process claim unripe under *Williamson*. These cases are entirely consistent with the Court of Appeals' decision here.

Willis's fifth argument does not establish any compelling basis for this Court to grant certiorari.

---

16. Jurisdiction of the federal court in *County of Allegheny* was based upon diversity of citizenship.

VI.

THE COURT OF APPEALS DETERMINED THAT UNDER OKLAHOMA EMINENT DOMAIN LAW A CONDEMNOR MAY TAKE POSSESSION OF THE CONDEMNED PREMISES PRIOR TO A HEARING ON THE RIGHT TO TAKE. IN ITS SIXTH ARGUMENT, WILLIS CONTENDS THE COURT OF APPEALS, IN SO HOLDING, FAILED TO FOLLOW OKLAHOMA LAW AS PRONOUNCED BY THE OKLAHOMA SUPREME COURT. CERTIORARI REVIEW OF WILLIS'S SIXTH ARGUMENT SHOULD BE DENIED AS WILLIS FAILS TO STATE A COMPELLING REASON FOR THIS COURT TO GRANT CERTIORARI, AND WILLIS'S CLAIM HAS NO MERIT.

First, Willis's Sixth Argument — that the Court of Appeals misapplied Oklahoma state law — is not a basis under Sup. Ct. R. 10 for this Court to grant certiorari. There is no compelling reason for this Court to grant certiorari review of Willis's Sixth Argument, as no federal question is presented.

Second, Willis misstates the law of Oklahoma, which was accurately set forth in the Court of Appeals' opinion. Upon a proper reading of Oklahoma law, Willis's Sixth Argument has no merit.

As noted above, under Oklahoma constitutional and statutory authority, a condemnor may take possession of the condemned property after paying into court the amount assessed by the commissioners as the value of the taking. There is no constitutional nor statutory requirement that possession be delayed pending resolution of a condemnee's objection to the right to take.

The specific issue raised by Willis here was raised in *Town of Ames v. Wybrant*, 220 P.2d 693 (Okla. 1950). In *Wybrant* a municipality sought to obtain through condemnation the estate of the defendants in groundwater in lands owned by the defendants. The defendants sought to dismiss the condemnation

proceeding, claiming the municipality did not have the power to condemn the rights involved. When the trial court passed consideration of the motion to dismiss until the commissioners filed their written report assessing the value of the property taken, the defendants asked the Oklahoma Supreme Court to assume original jurisdiction and issue a writ of prohibition to the trial court enjoining further proceedings. The defendants sought such a writ because once the report of the commissioners was filed the municipality stated its intention to pay the sum assessed into court, and to take immediate possession of the premises.

The Oklahoma Supreme Court denied the defendant's request for a writ of prohibition. After discussion of the Oklahoma eminent domain procedures, the Oklahoma Supreme Court concluded its opinion by stating:

> In view of the stress laid in the argument upon the alleged threat of plaintiff therein to enter possession before a determination of the question of plaintiff's right to condemn we deem it well to say that the District Court after objection to the Commissioners' report or the trial judge prior thereto *in a proper case and upon proper application and showing in connection with preliminary steps in condemnation could make an order temporarily restraining the condemnor from taking possession of the land pending final determination of the right to condemn.*

Id. at 696 (emphasis added). *See also Wrightsman v. Southwestern Natural Gas Co.*, 46 P.2d 925, 933 (Okla. 1935) (same). Thus, the Oklahoma Supreme Court reaffirmed what it held in *Wrightsman* that the landowner *may seek equitable relief* to restrain the condemnor from taking possession of the property pending resolution of the landowner's objection to the right to condemn. The Oklahoma Supreme Court has never deviated from this holding. Thus, a condemnee has a method to test the right to condemn prior to losing possession — by exercising its

right to seek an order temporarily restraining possession pending determination of the right to condemn.

The Court of Appeals relied upon *Wybrant* and *Wrightsman*, as well as *City of Bartlesville v. Ambler*, 499 P.2d 433, 436 (Okla. 1971). In *Ambler*, the Oklahoma Supreme Court reaffirmed that "[a]ccording to *Wybrant* and *Watkins* [*v. Board of Commissioners*, 174 P. 523 (Okla. 1918)], a public body having the power of condemnation *can be enjoined* from appropriating private property for public use until it has initiated condemnation proceedings and had its right to condemn the property finally determined." *Id.* at 436 (emphasis added).

In the state court proceedings, Willis *never* sought injunctive relief from the trial court prior to PSO taking possession of Willis's property and constructing the railroad. The Court of Appeals properly interpreted Oklahoma law, and properly determined that Oklahoma law did not support Willis's claims that either the Oklahoma eminent domain procedures are invalid or that Willis was deprived of its rights under Oklahoma law.

Furthermore, the Court of Appeals' expression on this state law issue was a synthesis of a somewhat confusing body of state court precedent. As recognized by the Court of Appeals, "[t]his point is obscured somewhat by decisions of the Oklahoma Supreme Court. . . ." Pet. App. A at 7a. As observed by respected authority,

> [i]t is the primary responsibility of state courts of last resort to construe provisions of state statutes and constitutions to adjudge the validity of state statutes in light of state constitutions. The Supreme Court is accordingly hesitant, when the highest state court has not spoken, and spoken clearly, to construe state statutes and constitutions of doubtful meaning, or to hold that a state statute violates the state constitution. And this hesitation is apparent in the exercise of the Court's discretion in granting or denying writs of certiorari to review decisions of federal courts of appeals alleged to be in conflict

> with applicable state law. The Court usually is reluctant to grant review of cases turning on state statutes or constitutions where state decisions on the issues are non-existent or are in confusion. Unless the court of appeals' decision can be shown to be clearly wrong, the Court in such circumstances refuses to add its conjecture to that of the court of appeals as to a matter which ultimately rests with the highest state court. As stated in *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944), "ordinarily we accept and therefore do not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts."

Robert L. Stern, Eugene Gressman, Stephen M. Sharpiro & Kenneth S. Geller, *Supreme Court Practice* (7th Edition), p. 183.

As with its other arguments, Willis's sixth argument fails to present any compelling reason for this Court to grant certiorari review. Willis's argument is not that the Court of Appeals refused to follow state law on a state law question, but that the Court of Appeals misapplied state law. Not only is this argument inappropriate for certiorari review, but as demonstrated above the Court of Appeals' application of Oklahoma law was correct.

CONCLUSION

None of the six arguments tendered by Willis for certiorari review presents any compelling reason for this Court to exercise its discretion to review the opinion of the Court of Appeals. Accordingly, Willis's Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JON E. BRIGHTMIRE
Counsel of Record
RICHARD P. HIX
DOERNER, SAUNDERS, DANIEL
& ANDERSON, L.L.P.
Attorneys for Respondent
Public Service Company
of Oklahoma
320 South Boston
Suite 500
Tulsa, OK 74103
(918) 582-1211

ROBERT J. CAMPBELL, JR.
Counsel of Record
HUGH D. RICE
MICHAEL R. PERRI
RAINEY, ROSS, RICE & BINNS
Attorneys for Respondent
Burlington Northern and Santa Fe
Railway Company
735 First National Center West
Oklahoma City, OK 73102
(405) 235-1356